SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY
COURTHOUSE
GEORGETOWN, DE 19947

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RE: ***Wilfrieda A. Vleugels v. Network Flooring & Maintenance***
C.A. No. 05A-02-004-RFS

Date Submitted: September 5, 2005
Date Decided: September 16, 2005

Dear Counsel:

This is my decision regarding Wilfrieda Vleugels' appeal of the Industrial Accident Board's decision granting Claimant's Petition to Determine Compensation Due. This appeal is limited solely to the Board's determination of the Claimant's wage rate for the purpose of calculating benefits. For the reasons set forth herein, the Board's decision is affirmed.[1]

STATEMENT OF THE CASE

On January 20, 2003, the Claimant, Wilfrieda A. Vleugels ("Vleugels" or "Claimant") was injured in a compensable work accident when she was struck on the head by falling ice. She was working as an employee at the work site of her employer Network Flooring & Maintenance

[1] Accordingly, an Appeal of the Board's decision granting Network Flooring & Maintenance's Motion Contesting the Award of Attorney's Fees is now moot. As noted in the Board's decision on that issue, Claimant has received no benefit from these proceedings and is therefore not entitled to attorney's fees.

("NFM" or "Employer") at the time of the accident. NFM agreed that the injury was compensable and paid temporary total disability benefits to Vleugels from January 21, 2003 until April 29, 2003. It used a twenty-hour work week calculation. On April 30, 2003 NFM filed a petition to terminate her benefits, that was granted retroactive to the date of filing. Concurrently with this Appeal, the Board awarded Vleugels a 15% permanent impairment to the cervical spine as a result of the January work accident, resulting in 45 weeks of permanent impairment benefits. Both parties have stipulated that the outcome of this appeal will be used to determine the compensation rate for the 45 week permanent impairment benefits.

At the time of the accident, NFM was a small business run out of the home of Linda and Jeff Pargo. The business centered around contracts for small cleaning jobs which were able to be adequately handled by the Pargos. The business had no full time staff, and prior to this incident, Employer had been awarded only one other "big" commercial contract, a two week cleaning contract with a hotel in Bear, Delaware. NFM was able to handle this larger commercial contract by recruiting family and friends.

NFM bid on the contract to clean the buildings at the Summerlynn, the site of this accident and NFM's first commercial contract in Sussex County, approximately six months before finally being awarded the contract. Once the contract was awarded, NFM was told that they would have less than two weeks before work would commence. As a result, the Pargos again recruited family and friends, as well as posting an ad for part time workers in an Hispanic community center in Georgetown, to recruit local workers. Additionally, Jeff Pargo's father, who had also agreed to help with the project, recruited Vleugles, another student in the real estate classes he was taking, because he knew of her cleaning experience.

At the time of Vleugles' hiring NFM had secured a contract to clean one three-story building at the Summerlynn and was hoping to secure contracts for the other four or five buildings in the development. Each of the building's three floors had five units, and NFM had based its bid on the estimate that each unit in the building would take between eight to ten man hours to clean (eight hours with one person working and five hours with two people working). The contract required that each week a different floor be finished. Due to the limited time, as well as the fact that Linda Pargo was in her third trimester of pregnancy, part time workers who were not friends or family were sought out to help complete the contract.

In actuality, despite her pregnancy, Linda Pargo, as the owner of the company, was working on site at the Summerlynn every day of the contract, working a total of 27.5 hours, far more than any of the part time employees, in the first week when the incident occurred. The remaining eight part time employees worked an average of 8.25 hours in that week at the Summerlynn.

Claimant in this case arrived at the site for her first day of work on the morning of January 20, 2003. She had been at work for less than an hour and a half when she left the building to use a port-a-potty outside. On her way out of the site she was struck by ice that fell from a third story rooftop and landed on her head. She was then taken to the emergency room and did not return to work that day or on any subsequent day. As such, there are no prior nor subsequent weeks of work when Claimant was involved with NFM.

Ms. Vleugles filed a Petition to Determine Additional Compensation Due with the Industrial Accident Board ("the Board"), in order to seek an increase in benefits due to a determination of the average work week in accordance with the statute. Vleugles argued to the

board that the average work week should be computed by the number of hours people are actually working at the business. Claimant argued "the employer's average work week is not to be determined by whether they happened to have one person working 40 hours a week or five people working 8 hours a week. Under either of these scenarios the average work week is still 40 hours."[2] Claimant then asserted that the average work week of NMF was therefore in excess of 40 hours per week and that it should be calculated as "the number of days the employer had people on the site and the total number of hours that the employer has people on the site."[3] Claimant further asserted that the average work week should be defined based on the site in question and not factor in other employees working for Employer at different sites, explaining "Their average work week has included employees that worked elsewhere. So if you got a guy doing a cleaning job in Milton for eight hours one week, well they just used an employee with an eight hour week to depress the average. So we are very content and in fact agree that you should be looking at the Summerlynn site."[4]

Claimant concurrently argues that "the purpose of the statute is to compensate the employee for his lost earning capacity,"[5] by citing to *Fitzgerald v. Roy's Flying "A"*, 266 A.2d 193 (Del. Super. 1970) and explaining that since Vleugels was "available for full time work" she should be made whole by being compensated by an average work week of 40 hours.[6]

A. The Hearing

[2]Tr. at 79

[3]*Id*.

[4]*Id*. at 85

[5]*Id*. at 79

[6]*Id*. at 78

The only issue at the hearing was the correct determination of the "average work week" for NFM at the time of the accident pursuant to *Del. C.* § 2302.

Given the limited scope in this case, the relevant facts of the case concerned Claimant's wage rate, Employer's average work week, and the hours to be worked by Vleugels. Vleugels was hired at an hourly wage rate of $10.00 per hour.

However, there is some dispute about the hours Claimant was to work. Vleugels testified that she intended to work "anywhere from 25 to 30 hours a week"[7] for "at least six to twelve weeks"[8] and should therefore be recompensed as such. Linda Pargo testified on behalf of the Employer that multiple temporary workers were being hired to work various hours on the Summerlyn project in accordance with their individual schedules and that she understood that Vleugles was only available for work for two and a half days during the first week of the contract and would relay her schedule for the following weeks at a later date. At the time of Vleugels' hiring, NFM had obtained only one contract for one building. NFM expected that each building would take three weeks to complete. Both parties were aware that the possibility of future work was contingent on Employer securing contracts for the other four or five buildings to be completed at Summerlyn.

There is also disagreement about the correct formula for the calculation of the average work week for the employer, as well as which week or weeks should be the model for the average work week.

B. The Board's Decision

[7] Tr. at 10

[8] *Id*. at 12

In its decision on June 16, 2004, the Board noted that both parties agreed that Claimant should be compensated based on NMF's average work week and that the calculation should be limited to the employees working at the Summerlynn.

The Board compared Claimant's argument that Network's average work week was at least forty hours per week and therefore Claimant should be compensated as such, with Employer's argument that there were no full time employees at the time of Claimant's injury and that the hours varied each week. The Board rejected Claimant's argument that the employer's work week is based on the hours of operation. It found that just because NFM employed part time workers who were allowed to work around their personal schedules at all times of the day, it did not mean that NFM had a forty hour work week.[9] The Board further found that Claimant's job was inherently part time and that Claimant admitted that she did not expect to work full time.[10] The Board found Claimant's testimony that she would have quit her other jobs to work full time was disingenuous. It also noted that there were no full time jobs available with NFM.

Based on these findings, the Board ruled that Employer's average work week should be calculated based only on the part time employees working at the Summerlynn and the average week should be calculated as the week of the accident. The Board found that Employer's average work week at the Summerlynn at the time of the accident was 9.44 hours and all employees were temporary part time workers. Therefore, since NFM paid Claimant total disability benefits based on a twenty hour work week, the Board found that it was entitled to a credit toward future benefits for the overpayment.

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[9] *Wilfrieda Vleugles v. Network Flooring and Maintenance*, IAB Hearing No. 1225859, (June 14, 2004) at 5.

[10] *Id*. at 6.

STANDARD OF REVIEW

The Supreme Court and this Court repeatedly have emphasized the limited appellate review of the factual findings of an administrative agency. The function of the reviewing Court is to determine whether the agency's decision is supported by substantial evidence. *Johnson v. Chrysler Corp.*, 312 A.2d 64, 66-67 (Del. 1965); *General Motors v. Freeman*, 164 A.2d 686, 688 (Del. 1960), and to review questions of law de novo, *In re Beattie*, 180 A.2d 741, 744 (Del. Super. Ct. 1962). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Oceanport Ind. v. Wilmington Stevedores*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A .2d 295, 297 (Del.), *app. dism.*, 515 A.2d 397 (Del. 1986). The appellate court does not weigh the evidence, determine questions of credibility, or make its own factual findings. *Johnson v. Chrysler Corp.*, 312 A.2d at 66. It merely determines if the evidence is legally adequate to support the agency's factual findings. 29 *Del. C.* § 10142(d).

DISCUSSION

A. The Calculation of the Average Work Week

Our Supreme Court considered a similar case in 2003. In *Shaw v. United Parcel Service*, 2003 WL 203070 (Del. Super.), *Aff'd*., 825 A.2d 239 (Del. Supr., 2003), the Court reviewed "a dispute concerning the number of hours in the employer's average work week which should be used to calculate the appellant's wages." *Shaw* at 1. As in our case, the facts material to determining the issue were undisputed. In *Shaw*, the claimant was a preloader at the Harrington United Parcel Service facility. Preloaders are all part time employees. Ms. Shaw was available for full time work and actually indicated on her application that she was applying for part-time

work only because no full time work was available. At the time of Ms. Shaw's injury, around 85% of the workers in the facility were part time, and most of the part time workers wanted to work full time. No full time positions were available to Ms. Shaw, however, at any time relevant to the court proceeding.

The Court notes that under 19 *Del. C.* §2302(b) the claimant's wages, for compensation purposes, are determined by multiplying her hourly rate by the "average work week of the employee's employer at the time of the incident." As in this case, Claimant in *Shaw* also relied upon *Furrowh v. Abacus Corp.*, 559 A.2d 1258 (Del. 1989), *Howell v. Supermarkets General Corp.*, 340 A.2d 833 (Del. 1975), and *Fitzgerald v. Roy's Flying "A",* 266A.2d.193 (Del.Super.1970), in support of the argument that the employer's "average work week" is the work week of a full time employee. In *Furrowh*, petitioner applied for a full time position as a security guard but accepted a part time position because all full time positions were filled. When she was injured on the job, the Board calculatedthe employer's average work week by averaging the hours of all security guards, both full and part time.

Furthermore, the court in *Furrowh*, citing the earlier case of *Howell,* stated that 19 *Del. C.* §2302(b) should be read as requiring that a part time employee who is capable of working full time should be compensated based on his or her loss of earning capacity, the same argument asserted by Claimant here. The *Furrowh* Court reasoned that the earning capacity of a person who is capable of working full time was that of a full time worker. Discussing this exact argument in *Shaw*, the Supreme Court noted that the *Furrowh* Court also stated, "however, that an employee's loss of earning capacity may appropriately be measured by part-time hours 'if the employment itself or the employee's relation to it is inherently a part-time one and likely to

remain so.'" *Shaw* at 2, (citing *Furrowh*).

In this regard, the Board determined in this case, as did the Board in *Shaw*, that Claimant's employment is inherently part time for two reasons. First, Claimant agreed that she had never intended to work full time, and second, all the temporary workers that were hired were part time. The Board also determined as in *Shaw*, that from the facts in evidence, there was no reasonable expectation that Claimant would obtain full time employment with NFM in the foreseeable future since further work was contingent on future contracts.

B. Determining the Average Work Week

Considering the above, the absence of a written contract, and a dispute as to how many hours Claimant was to be working per week, Claimant's compensation nonetheless must be calculated in accordance with the plain language of 19 *Del. C.* §2302(b). Her hourly rate must be multiplied by the "average work week of the employee's employer *at the time of the incident*." (Emphasis added). Our Supreme Court stated in *Rubick v. Security Instrument Corp.*, 766 A.2d 15, 19, that the "two purposes of the Worker's Compensation Act are 'to provide a scheme for assured compensation for work-related injuries without regard to fault and relieve employers and employees of the expenses and uncertainties of civil litigation.'" The *Rubick* court used the expressed intent of the statute to eliminate uncertainties.

In this case the Board looked to the commonly accepted meaning of the statutory language to determine the average week for NFM. The Board determined that the language of the statute required that the average work week must be determined as the average at the time of the accident.

In *Howard v. Peninsula United Methodist Homes*, 2003 WL 27701467 (Del. Super.), this

issue was comprehensively evaluated. The court stated, after a lengthy discussion of the case law, that, "[h]aving considered the history of the "wages" definition, and the variety of cases that have attempted to clarify the inherent ambiguities in the statutory language, I am convinced that the Court's construction in *Peterman* is correct. Section 2302(a) states that the term "wages" refers to "the money rate at which the service rendered is recompensed under the contract of hiring in force *at the time of the accident.*" *Del. Code.* 19 §2302(a) (emphasis added). Likewise, subsection (b)'s reference to the "employer at the time of injury" is specific limiting language concerning which employer's average work week is to be applied. Thus, both subsections emphasize that the calculation of "wages" is to be based on the pay rate, average work week and employer at the time of the accident." *Howard* at 10 (quoting *Peterman v. L.D. Caulk*, Del. Supr., No. 72, 1992.).

The Board's decision to use the week of the accident as the template for the average work week is thus supported by the plain language of the statute as well as the case law.

The *Howard* court also discussed the ambiguities in the statute relating to which workers' hours should be considered in calculating the average work week. The court correctly concluded that in cases where there are no full time employees (considered to be at least seven hours per day for five days) or in other cases where dividing between full time and part time employees may be impossible, "it presumably would fall within the Board's discretion to decide which workers' hours are to be used to determine the 'average work week' of the employer." *Howard* at 8, footnote 5. In the present case, both parties agreed that only the workers at the Summerlynn should be included in the calculation of the average work week. Therefore, the Board's determination of an average working week of 9.44 hours shall remain undisturbed.

CONCLUSION

The Board's determinations that the Claimant's employment was inherently part time and was likely to remain that way are supported by substantial evidence and distinguish this case from *Furrowh*, and all other cases relied upon by the Claimant. Therefore, the correct measure of Claimant's compensation as a per hour employee under the statute is the hourly rate of pay ($10.00) multiplied by the average work week of the Employer.[11]

The Board's determination that the week beginning on January 20, 2003 should be the determinative of the average work week for NFM is supported by the statute as well as the case law, and it does not constitute an error of law.[12]

The Board's determination that only workers at the Summerlynn should be included in the calculation of the average work week was both within their discretion as well as agreed to by both parties, and it does not constitute an error of law.

Claimant's further arguments were not supported by the current case law. This case is distinguishable from all the precedent cited by Claimant in support of her further arguments,

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[11]Claimant argues on appeal that there is no average weekly wage available since this was the first day of Claimant's employment as well as the first day of Employer work on the contract. This argument is unpersuasive. As it was the first day of the contract, it was also the first full week of a three week job. Additionally, the work was divided into one floor per week, allowing a reasonable indication of the average week for the job.

[12]Claimant asserts that the statute requires an averaging of the work weeks in the months before and after her injury is unpersuasive for two reasons. First, the court in *Howard* correctly notes that the "six month" average that Claimant refers to in her brief is only a measure to be looked at for employees whose wages are fixed by their output, an issue that was exhaustively explained and decided in *Rubick*. Second, Claimant agreed that only workers at this site should be included in the calculations and this job was only a three week contract. Further, to include the weeks before or after the injury in a calculation of the average work week allows a greater probability for the artificial inflation or deflation of the week, which is in direct contrast with the plain language and intent of the statute.

many of which were not raised in the court below.[13]

The Board's determination that Claimant received no benefit from the hearing was correct. The hearing determined that the correct workweek for compensation purposes was below what NFM had originally believed and had paid out accordingly.

Considering the foregoing, the decision of the Board is affirmed.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary

[13]In the IAB hearing Claimant argued that the average work week for NFM should be measured by the number of hours when people are on the site at the Summerlynn. In her brief Claimant raises further arguments, (1) that there is no average work week at the Summerlynn, (2) and alternatively that the average work week should be determined by averaging the weeks worked at the site and, (3) that the disputed oral agreement between the parties was controlling. These arguments are outside the scope of this appeal.